Nos. 03-1116 & 03-1120

Supreme Court, U.S.
FILED
SEP 23 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JENNIFER M. GRANHOLM, et al.,

Petitioners,

v.

ELEANOR HEALD, et al.,

Respondents.

MICHIGAN BEER &
WINE WHOLESALERS ASSOCIATION,

Petitioner,

v.

ELEANOR HEALD, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE GOLDWATER INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICUS CURIAE*[1]

The Goldwater Institute, established in 1988, is a nonprofit, independent, nonpartisan, research and educational organization dedicated to the study of public policy. Through its research papers, editorials, policy briefings and forums, the Institute advocates public policies founded upon the principles of limited government, economic freedom and individual responsibility. One of the central missions of the Goldwater Institute is studying and promoting the elimination of government burdens on commerce and trade.

SUMMARY OF THE ARGUMENT

The U.S. Constitution does not permit states to interfere with interstate commerce by enacting invidious and partial restraints on the flow of goods. The Commerce Clause also prevents differential treatment of in-state and out-of-state interests. Although Sec. 2 of the Twenty-first Amendment provides a means for state regulation of alcoholic beverages, it doesn't allow for discrimination against out-of-state interests. Accordingly, the Court should strictly scrutinize any state restrictions.

State schemes such as those in Arizona and Michigan do not narrowly address core concerns and are mostly designed to protect in-state liquor interests. A recent Goldwater Institute study confirmed that regulatory

[1] This brief is filed with the consent of the parties. No counsel to any of the parties to this matter authored this Brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief.

schemes such as those in Arizona greatly reduce consumer choice. Wines that are readily available on the internet are not otherwise available for purchase by Arizona consumers. Removing such state barriers will provide greater consumer choice and encourage continued e-commerce.

ARGUMENT

I. INTRODUCTION

Arizona is one of two dozen states that prohibit the direct shipment of out-of-state wine to consumers. Although the number of nationwide wineries and available wines has grown dramatically over the past thirty years, wholesalers continue to dictate the availability of out-of-state wines to Arizona consumers. This is done through a three-tiered distribution system.

The three-tiered distribution system requires that out-of-state producers sell their products to licensed wholesalers (tier 1), who then sell to retailers (tier 2), who make a selection of beverages available for sale to consumers (tier 3). Under Arizona law, an out-of-state producer's failure to use a licensed wholesaler is illegal. Ariz. Rev. Stat. § 4-243.01.[2] Domestic wineries, however, are not prohibited from directly selling and shipping to consumers. Ariz. Rev. Stat. § 4-205.04.[3] Because of Arizona's current prohibition on direct shipping, however, visitors

[2] See also Ariz. Rev. Stat. § 4-244; 19 Ariz. Admin. Code (A.C.C.) R1-202 – 1-204.

[3] See also Ariz. Rev. Stat. §§ 4-203.03, 4-203.04.

from several states cannot order directly from Arizona wineries. Specifically, California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia and Wisconsin are all "reciprocity" states. As a result of Arizona law prohibiting the direct shipment by out-of-state wineries, those states will not allow consumers located in their jurisdictions to order and directly purchase Arizona wine.[4]

A 2003 report by the Federal Trade Commission concluded that such bans on interstate direct shipping represent the single largest barrier to expanded e-commerce in wine.[5] The report also concludes that consumers would reap significant benefits if they had the option of purchasing wines online from out-of-state sources.[6] The benefits include a much greater variety of wine, lower costs, and the convenience of home delivery.[7]

II. STATE LIQUOR DISTRIBUTION SCHEMES THAT FAVOR IN-STATE OVER OUT-OF-STATE INTERESTS VIOLATE THE COMMERCE CLAUSE

The United States Constitution grants Congress the power to "regulate commerce with foreign Nations and among the several States and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 4. James Madison explained that

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[4] See Wine Institute, Industry Background and Statistics (at <http://www.wineinstitute.org>) (accessed, Sept. 20, 2004).

[5] Staff of the Federal Trade Commission., "Possible Anticompetitive Barriers to E-Commerce: Wine," F.T.C. Report., July 3, 2003.

[6] *Id.*

[7] *Id.*

such a provision is necessary to ensure that states do not impose levies on imports and exports passing through their jurisdictions.[8] In other words, the Commerce Clause is intended to avoid the tendency toward economic Balkanization. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). It does this by keeping commercial intercourse among the States free from "invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824). Chief Justice Marshall elaborates in *Gibbons* that, "[if] there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."

In addition to the affirmative authority conferred upon Congress, the Commerce Clause also provides an implied limitation on state regulation affecting interstate commerce. Early on, the Supreme Court recognized the notion of a "dormant" Commerce Clause. *Wilson v. Black Bird Creek Marsh*, 27 U.S. 245 (1829) (a state law may be invalid if it is "repugnant to the power to regulate commerce in its dormant state"). The dormant Commerce Clause prevents differential treatment of in-state and out-of-state interests. *Dennis v. Higgins*, 498 U.S. 439, 447 (1991); see also, *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) ("the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce"). Thus, any state laws that are intended or actually benefit in-state economic interests at the expense of out-of-state interests are prohibited. *Oregon Waste Systems v.*

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[8] James Madison, *The Federalist Papers* No. 42 (Clinton Rossiter ed., 1961).

Dep't of Environmental Quality, 511 U.S. 93, 99 (1994); see also, *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 87 (1984) ("the [Commerce] Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce"). The Supreme Court has held that the fundamental purpose of the dormant Commerce Clause is to eliminate economic protectionism by preventing states from providing advantages for its residents at the expense of non-residents in matters of interstate commerce. *General Motors v. Tracy*, 519 U.S. 278, 299 (1997).

The Twenty-first Amendment, U.S. Const. amend. XXI, and the Commerce Clause both are parts of the United States Constitution. Accordingly, each should be read or interpreted in light of the other. As the Court noted in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, the Twenty-first Amendment did not "repeal" the Commerce Clause's relevance to state regulation of intoxicating liquors. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964) (holding that such a result "would be patently bizarre and is demonstrably incorrect"). Clearly, if the commodity at issue were grain or lumber, rather than liquor, there would be no dispute that regulations imposed by states are unconstitutional. *Id.* at 329. For example, state laws limiting the length of trucks on roadways, *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978), the importation of waste, *Philadelphia v. New Jersey*, 437 U.S. 617, 620 (1978), and the transportation of fish, *Hughes v. Oklahoma*, 441 U.S. 322 (1979), have all been invalidated as impeding the free flow of commerce between the states.

In one of the most important cases decided after *Hostetter*, this Court was confronted with the issue of a

Hawaii tax exemption for locally produced alcoholic beverages. *Bacchus Imports v. Dias*, 468 U.S. 263 (1984).[9] In striking down that statute, this Court determined that Hawaii's tax exemption expressly reflected a discriminatory intent and was thus incapable of withstanding strict scrutiny review. *Id.* at 273. The Court also expressed that whatever the scope of the Twenty-first Amendment, its purpose was not to allow states to favor local liquor industries by erecting competitive barriers. *Id.* at 276.

The Supreme Court did recognize that temperance or other core concerns may be used to justify a state statute that interferes with interstate commerce. *Id.* This test, normally referred to as the "core concerns" analysis, examines state liquor statutes in light of recognized concerns such as temperance, prevention of monopolies, *Healy v. Beer Institute,* 491 U.S. 324, 342-43 (1989), and the collection of state taxes, *North Dakota v. United States*, 495 U.S. 423, 432 (1990). The existence of core concerns, however, does not eliminate the burden a state has in establishing that its discriminatory laws are the only means available to advance or protect those core concerns. The statutory schemes in both Arizona and Michigan fail to meet this test.

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[9] See *Brown-Forman Distillers v. N.Y. Liquor Auth.*, 476 U.S. 573 (1986) at 584, citing *Bacchus Imports v. Dias, supra*, for the proposition that state regulation of alcohol is reviewable under the Commerce Clause.

III. STATE REGULATORY SCHEMES PROHIBITING THE DIRECT SHIPMENT OF WINE DO NOT NARROWLY ADDRESS STATE CONCERNS AND CREATE UNREASONABLE BARRIERS TO CONSUMER CHOICE

Because distribution systems such as those in Arizona and Michigan are discriminatory on their face, courts should apply a strict scrutiny standard when evaluating whether those statutes offend the Commerce Clause. Only narrowly tailored statutes that directly address legitimate state core concerns will be upheld. See *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984); accord *Bacchus Imports v. Dias, supra*; accord *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994) (holding that "preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits"). Arizona's statutes do not address the core concerns of temperance, prevention of consumption by minors, orderly market conditions or tax collection. The existing Arizona statutory scheme is designed to favor domestic wine products.

Reasonable measures can be added to state statutes to address core concerns and ensure alcoholic beverages are not delivered to minors. For example, other jurisdictions have implemented safeguards requiring the purchaser to provide a driver license number and credit card at the time of purchase or requiring the shipping agent to obtain proof upon delivery that the recipient is at least twenty-one years of age.[10] Moreover, there are no records to

[10] Va. Code Ann. § 4.1-112.1. Virginia law is similar to laws in other jurisdictions (e.g., Ga. Code Ann. § 3-6-31, La. Rev. Stat. Ann. § 26:359),

(Continued on following page)

suggest that temperance is even a concern or issue in Arizona.[11] Additionally, a recent report published by the Federal Trade Commission concluded that states with direct shipping have experienced few or no problems with shipments to minors.[12] Also, minors can already order (theoretically) on the Internet from wineries, thus, this is not a "new" or unique concern.

Another recognized core concern potentially justifying potential discrimination is the pursuit of "orderly market conditions." After the repeal of Prohibition, there was a concern that organized crime would continue to control the distribution of alcoholic beverages. *Dickerson v. Bailey*, 212 F.Supp.2d 673, 679-80 (S.D.Tex. 2002). Thus, many states adopted a three-tiered system to ensure "orderly market conditions."

Such concerns are of little relevance today and the phrase now is a euphemism for "wholesaler protection." The three-tiered system has created an environment where fewer and fewer wholesalers control more and more product.[13] For instance, one Arizona wholesaler, Southern

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and demonstrates that reasonable methods exist to address the potential for minors to receive shipped wine.

[11] On September 19, 2003, the Arizona Department of Liquor responded to a Goldwater Institute public records request by stating that, "The Department of Liquor Licenses and Control does not maintain records of citations or prosecutions concerning the importation of liquor into the state by minors. We have no historical record available on this subject matter."

[12] Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 3, 2003). According to the report, states allowing for the direct sale and shipment of wine have not experienced any significant problems with underage consumption.

[13] The number of "wholesalers" of alcoholic beverages has decreased by over 75 percent over the past thirty years. At the same time,

(Continued on following page)

Wine & Spirits, has benefited from the continuing consolidation. Its eight-state operation brings in over $2 billion in annual revenue and Southern controls about 11 percent of all domestic wine and liquor consumption.[14] Not surprisingly, wholesalers have been the leading opponents of any change to the three-tiered distribution system.[15]

The last core concern that a state may invoke to justify curtailing the direct shipment of wine by out-of-state producers is that the shipment across state lines may impair revenue or tax collection. By itself, revenue generation is not a local interest that can justify discrimination against interstate commerce. *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1984). Moreover, the basis for such a concern is mostly speculative. For instance, if Arizona can collect taxes on shipments from in-state wineries, there is no reason why it cannot collect taxes on shipments from out-of-state wineries. For tax purposes, alcoholic beverages should be treated the same way as any other catalog, telephone, or Internet purchase. If the state can collect taxes on shipments of clothes or furniture from

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the number of wineries has increased over 500 percent. Thus, less than 17 percent of wineries are represented by distributors in all fifty states. Free the Grapes, Issue Summary (at <http://www.freethegrapes.org>) (accessed, Sept. 20, 2004).

[14] See, Alix M. Freedman & John R. Emshwiller, *Vintage System: Big Liquor Wholesaler Finds Change Stalking its Very Private World*, Wall Street Journal, p. A1 (Oct. 4, 1999).

[15] Wall Street Journal Editorial Board, *A Vintage Ruling*, Wall Street Journal, p. A8 (Apr. 5, 2002); see also, *A bill to allow direct shipment of out-of-state wines received heavy opposition from lobbyists for wine distributors and retailers*, East Valley Tribune, p. A6 (Sept. 17, 2003).

out-of-state, there is no reason why it cannot do the same with wine.[16]

Although e-commerce sales have continued to rise, traditional brick-and-mortar retailers and wholesalers have opposed increased Internet transactions.[17] In testimony concerning state impediments to e-commerce before the U.S. House of Representatives, Ted Cruz, Director of the Office of Policy and Planning of the Federal Trade Commission, stated that existing businesses may be seeking to use government authority to impede new entrants from competing.[18] Thus, American consumers are paying at least $15 billion more for goods and services as a result of e-commerce protectionism.[19]

Wine, unlike many other consumer goods, is unique. Wines are distinguished not only by color and region, but by the soil used to grow the grapes and the barrels in which they are stored or aged. Accordingly, every bottle of

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[16] Arizona could condition a direct shipping permit upon the collection of taxes. Several states have enacted similar legislation to ensure out-of-state wineries pay taxes on shipments to in-state consumers. See La. Rev. Stat. Ann. § 26:359(B); N.H. Rev. Stat. Ann. § 178:14a(V); Nev. Rev. Stat. Ann. § 369.462.

[17] U.S. Department of Commerce, U.S. Department of Commerce News, 2nd Quarter 2002 release (Aug. 22, 2002) E-commerce sales increased almost ten times greater than retail sales over a comparable quarter.

[18] Ted Cruz, *Prepared Statement of the Fed. Trade Comm'n: Before the Subcomm. On Commerce, Trade, and Consumer Prot. Comm. on Energy and Commerce*, U.S. House of Representatives, 107th Cong. (September 22, 2002).

[19] Robert D. Atkinson, *Revenge of the Disintermediated: How the Middleman is Fighting E-Commerce and Hurting Consumers*, Progressive Policy Institute (Jan. 26, 2001); see also, Brian Sullivan, *FTC says states' e-commerce laws hurt consumers*, ComputerWorld (July 18, 2002).

wine truly is distinct. Given the wide variety available, as well as recent studies suggesting the health benefits of wine,[20] it should not be surprising that Americans are drinking more wine than ever before.[21]

Distribution systems such as those in Arizona and Michigan whereby retailers must buy wines from a limited number of licensed wholesalers limit retailers to

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[20] Peter Jaret, medically reviewed by Gary D. Vogin, MD, *Bottoms Up: To Your Health*, WebMD Feature Archive 2001 (at <http://my.webmd.com/content/article/14/1671_51501.htm?lastselectedguid={5FE84E90-BC77-4056-A91C-9531713CA348}>) (accessed, Sept. 20, 2004), cites numerous studies that report the health benefits of wine, including: *Annals of Internal Medicine*, September 2000, reporting that light drinkers of wine cut risks of dying prematurely by one year; the *European Heart Journal*, January 2000, found that drinking wine appears to dilate arteries and increase blood flow reducing the risk of heart problems; scientists published in the journal *Pharmacology, Biochemistry, and Behavior*, May 2000, found that men and women around the age of 32 who had a glass or two of wine each day had significantly higher levels of "good" cholesterol because they remove the "bad" artery-clogging cholesterol before they can choke blood vessels; the *Journal of Nutrition and Biochemistry*, November 2000, reported similar findings, and found that the reduction of artery-clogging cholesterol reduced the likelihood of cardiovascular disease, such as heart disease and stroke; the *Journal of Cellular Biochemistry*, June 2000, reported that drinking wine in moderation may slow the growth of breast and prostate cancer cells; *Oncology Reports*, July-August 2000, similarly found that wine consumption can slow down the growth of liver cancer cells; additionally, the *Journal of the American Dental Association*, June 2000, found that wine consumption may inhibit the growth of oral cancer cells; a report in the *American Journal of Epidemiology*, April 2000, showed that women who drank one to three glasses of wine had greater bone mineral density; similarly, *Osteoporosis International*, November 2000, found that men, age 54-63, who drank a glass or two of wine a day also showed signs of greater bone mineral density.

[21] Wine Institute, Industry Background and Statistics (at <http://www.wineinstitute.org>) (accessed, Sept. 20, 2004).

essentially the same selection of wine. This restricts consumers' freedom of choice. While the opportunities are ample, the actual freedom to purchase wine from the vast Internet marketplace is extinguished under regulatory schemes such as those in Arizona and Michigan.

The Goldwater Institute recently conducted a study of the availability of a broad cross-section of wines.[22] A random variety of wines was selected. Some wines were regional selections, while others were from popular wineries with special vintages. All of the wines, absent Arizona regulations, were available for online purchase and direct delivery to the consumer. However, in a sampling of 15 specialty wines readily available for sale on the Internet, only two could be obtained from Arizona retailers, and one was available as to brand and variety, but not vintage. The other 12 could not be obtained at all. Clearly, consumer options are greatly diminished with state regulations that impede the direct shipment of out-of-state wines.

Prohibitions on the direct shipment of out-of-state wines not only leaves consumers with fewer choices, but the system also hurts local wineries by limiting their ability to ship wines to numerous jurisdictions. Large wholesalers, who benefit the most from the three-tiered distribution system, continue to oppose any changes.

Because distribution schemes such as those in Michigan unnecessarily discriminate against out-of-state producers, they should be struck down as contrary to the U.S. Constitution. Such a result will provide wine consumers with the benefit of a free market: more choice,

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[22] Jennifer Wright, *Stomping Grapes: How Arizona Tramples Consumer Choice in Wine*, Goldwater Institute (September 22, 2004).

greater convenience and lower prices. It will serve as a model for e-commerce trade as well.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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